(16)

In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 1036.

THE STATE OF OHIO, *ex rel.*, HUGH M. FOSTER,
A Taxpayer,
Petitioner,

vs.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

PETITION FOR REHEARING.

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INDEX.

TABLE OF AUTHORITIES.

Cases.

Statutes.

Constitution.

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Comes now the above named Petitioner, and respectfully presents this Petition for a Rehearing of the petition for a writ of certiorari in this case.

I.

JURISDICTION.

The petition for certiorari was filed March 12, 1945, and was denied on April 23, 1945. This petition is filed before May 29, 1945, under rule made by this Court, and under Rule 33 (28 U. S. C. A., Sec. 354).

II.

REASONS FOR PETITION FOR REHEARING.

1. A re-examination and re-analysis of the petition and brief filed herein and of the material facts and applicable decisions, leads petitioner to the conviction that the real error underlying the action of the Supreme Court of Ohio establishing the right of the petitioner herein and of the jurisdiction of this Court has escaped this Court's attention.

Petitioner contended in the application for rehearing (p. 620 R.) in the Ohio Supreme Court and in the motions filed to vacate the judgment of the Supreme Court of Ohio —entered on August 9, 1944, that the action, decision and judgment, violated the 14th Amendment to the United States Constitution, by

1. Denying the petitioner due process of law;
2. By denying petitioner the equal protection of the laws.

The judgment of the Supreme Court of Ohio, on the application for rehearing became final on November 22, 1944 (pp. 906, 909 R.), and became final on the motion to vacate the judgment on December 20, 1944. (pp. 923, 906, 907, 910, 911, 973, 909 R.)

> "A federal question raised for the first time on motion to set aside judgment was in time."
>
> *Eads Brok. Co. vs. Ft. Scott*, 187 U. S. 547.

It is possible that in the statement of the case and in the brief, undue emphasis and probably unjustified emphasis, was given to the disqualification of Judge Turner on account of a pecuniary interest, as declared in *Tumey vs. U. S.*, 273 U. S. 510, 522-523, and other authorities cited.

It seemed to your petitioner that the admitted and undisputed facts of record with reference to the terms of the lease of Judge Turner to the Kroger Company did in fact render the judgment of the Supreme Court of Ohio void, and that because of that decision the State could not recover such tax money or assess a personal liability therefor when the vendor refused to keep records and account therefor, unless the state could prove each specific sale.

If, however, it be assumed that the court was a constitutional court and that the judgment was neither void nor voidable because of Judge Turner's disqualification, there is another and we believe a controlling ground of violation of the 14th Amendment, but which escaped this

Court's attention, or which was obscured in the statement of the case and argument in our original petition. Such specific claim was made in oral argument in the Supreme Court of Ohio. (p. 25 Petition for Certiorari.)

That claim was, and is, that the decision and the judgment of the Supreme Court of Ohio resulted in denying due process of law and of the equal protection of the laws by stripping the petitioner and the State of Ohio of all real remedy, for an injury done to it in its public revenue (arising out of the levy and collection by licensed vendors of sales taxes from the people). It cannot be questioned but that this additional question under the 14th amendment was presented to the Supreme Court of Ohio for consideration. *Copperwald Slade Co. vs. Ind. Com.*, U. S. Sup. Ct., L. Ed. Adv. Opinion Vol. 8, No. 13, pp. 928, 930.

In 136 O. S. 295, 303, *State ex rel. Foster vs. Miller et al.*, the Supreme Court of Ohio had declared that mandamus did not lie to compel licensed vendors of merchandise, charged with the duty of collecting sales taxes from the people, to pay such sales tax money into the State Treasury, because they "were not tax collectors—officers —agents or trustees of the state" and that the only remedy provided by law was an assessment by the Tax Commission for personal liability for the amount of taxes levied, collected and unaccounted for by cancellation of prepaid tax receipts.

The action in the instant case in the Court of Appeals was the seeking of a writ of mandamus to compel the performance of a specific duty, enjoined by the sales tax law, to make assessments for personal liability as provided by law, as stated in 136 O. S. 303.

It was stated by the Ohio Supreme Court and conceded by the Tax Commissioner that the remedy by assessment was the only remedy available to the State, or to the Tax Commissioner in the premises.

The complaint herein is predicated on the action of the Supreme Court of the State of Ohio taken at the end of the case. The petitioner no longer had opportunity to protect the state or add to the record and it follows that this Federal question was raised at the first opportunity, and it became a controlling question in the case, and the denial, of our claim that the State was stripped of all real remedy without opinion, was a denial of the Federal right, thus specifically set up.

Such action therefore under the applicable decisions of this Court became an additional basis for a petition for a writ of certiorari to this Court and established the jurisdiction of this Court, or,

It must, therefore, be true that a Federal question of great and far-reaching public importance has been presented by the petition and record, which has not heretofore been determined, but which should be determined by this Court.

It is claimed by all instrumentalities in Ohio, including associations of large vendors, chain stores and department stores, that as a result of the failure and claimed inability to enforce the sales tax law where the vendors fail to keep records, and have mingled the taxes with their sales receipts and where the state cannot prove each specific sale, as upheld by the Supreme Court of Ohio in its decision herein, that the State has lost and is losing from 5 to 8 million dollars each year. The Tax Commissioner stated this fact to the state Legislature in the past two months, in open session, the first time in 10 years, that this admission by the Tax Commission has been made. Other well-informed sources declared that such loss might be as much as 15 million each year, such as Col. Sherrill, former Kroger executive and City Manager of Cincinnati, O. It was admitted by Evatt, Tax Commissioner, page 842 R., that without this remedy to assess for personal liability the state had no remedy for such taxes collected and unaccounted for.

Taxes being the life blood of the state and nation (*DeBolt vs. L. Ins. Co.*, 1 O. S. 567) and being essential to its existence, and it being lawful to levy and collect taxes from the people by summary action for essential public purposes, when the levy is commanded as here, by express provision of the Ohio statute, then the tax is in effect reduced to the possession of the state. A remedy must exist therefore, and if denied it becomes a violation of the 14th Amendment (*DeBolt vs. L. Ins. Co.*, 1 O. S. 566-568, *Monongahela B. Co. vs. U. S.*, 216 U. S. 177, 195). No state has a right to collect taxes and give or abandon them to private individuals. *Olcott vs. Sup. etc.*, 16 Wall. (U. S.) 678, 689-694.

The denial of all remedy is made manifest by an examination of Section 5546-1 G. C., the initial section of the Retail Sales Act. We quote:

> "The tax collected by the vendor from the consumer under the provisions of this act shall not be considered as a part of the price, but shall be considered as a tax collection for the benefit of the state, and * * *, no persons other than the state shall derive any benefit from the collection or payment of such tax."

The reasonable interpretation and plain import of this section is, that the tax is something separate and apart from the proceeds of the sale of merchandise, and that the vendor is required to collect the tax upon each sale and keep it as a separate account and upon such collection of the tax, he becomes an agent "for the benefit of the state." This matter is made the more emphatic in the last two lines of the section: "No person other than the state shall derive any benefit from the collection or payment of such tax."

We read the legislative mind to determine whether it was meant by that, that no vendor should illegally retain the tax and mingle it with his own funds, but it is at least capable of such interpretation.

All of these things being true, it clearly appears that the statute has provided a very definite remedy for enforcement of the act and for the payment of such taxes by the vendor as agent of the state into the State Treasury.

Those provisions of the statute are supplemented by Section 5546-9a which provides that the vendor "shall be personally liable for the amount" of such taxes and that "the commissioner *shall have power to make an assessment* against such vendor or consumer, *based upon any information within its possession* or that shall come into its possession," since the vendor has the absolute power and remedy in his hands to collect the tax.

This record shows by the sworn reports made by these two vendors and also by the audits made by the examiners employed by the Tax Commission, that there was a failure on the part of these two vendors to render a proper accounting. This is also clearly stated by Judge Turner in his opinion in this case.

Notwithstanding these clear-cut, definite remedies provided by the Legislature of Ohio, the Supreme Court has effectively stripped the State of Ohio and the Tax Commission of such remedy and therefore all remedy. It is to cure this action on the part of the Supreme Court of Ohio that we urge upon this Court a reconsideration of our petition.

It does not lie within the power of the state whether acting through its judiciary, legislative or executive departments to deprive one of all remedy for an injury done without violating the 14th amendment. It certainly does not lie within the power of the Supreme Court of the State, at the end of the case, when the party no longer has an opportunity to protect itself, or himself, or add to the record, for a court to strip such party of all remedy therefor, without there being available an appeal to this Court to protect the invasion of such right. Such action, this Court has declared, is arbitrary and capricious.

Saunders v. Shaw, 244 U. S. 317, 319, 320;
Missouria vs. Gehner, 281 U. S. 313, 320;
Brinkerhoof-Farris Co. vs. Hill, 281 U. S. 673, 677, 682;
Truax vs. Corrigan, 257 U. S. 312;
Chicago B. & Q. etc. vs. Chicago, 166 U. S. 226, 228;
Meyer vs. Richmond, 172 U. S. 82, 91;
St. Louis Con. C. Co. vs. Illinois, 185 U. S. 203, 206;
Manley vs. Park, 187 U. S. 547, 550.

A correct ruling thereon, in accordance with this Court's applicable decisions, on those constitutional and fundamental questions and guaranties under the 14th Amendment to the United States Constitution, applicable alike in all jurisdictions, would have resulted in a different conclusion.

III.

THE CONTROLLING QUESTION.

The Ohio Sales Tax Act provides for the levy of a tax on retail sales; fixes the rates; specifies the persons who should pay the tax; when and how the tax shall be paid; where it shall be paid; who shall collect the tax; that such collector shall keep records of all sales; that the tax collected is collected only for the benefit of the state; that such tax collector shall account for all taxes thus collected, and delegates to a lawfully constituted administrative body the power and duty of promulgating and adopting rules and regulations and administering and enforcing the law, both as against the taxpayers, the consumers of merchandise, and the tax collector, the vendors of the merchandise and prescribed the remedy to be pursued in enforcing, not only an accounting but the collection of the "personal liability" against the vendors as tax collectors. *Such remedy is reposed in the Tax Commission of Ohio and has been recognized by the Supreme Court of Ohio as the exclusive remedy*

prescribed by the Sales Tax Act against the vendor, the tax collector, to protect the State of Ohio in such public revenue. The controlling question therefore is whether the Supreme Court of Ohio has by its decision stripped the state and the Tax Commission of Ohio of the only remedy afforded by the Sales Tax Act, and whether by its refusal to enforce such exclusive remedy, there is a violation of the 14th Amendment to the United States Constitution. We think it is entirely clear, that vendors of taxable merchandise in Ohio who are constituted by the Sales Tax Act as collectors of taxes are agents and in a sense public officials, and being charged with the duty of keeping records of sales showing not only the amount of the sales of taxable merchandise, but also of the taxes which they have collected from the consumers of such merchandise that the *decision of the Ohio Supreme Court which places upon the State of Ohio the impossible burden of proving specific sales where no records have been kept by the vendors of such sales and collections of taxes result, in stripping the State of Ohio of all remedies which are clearly provided by the Sales Tax Act. It is in its nature and result arbitrary and capricious.*

The decision of the Court of Appeals in this case declared that upon the "information" then shown to be in the possession of the Tax Commission of Ohio there was sufficient information as provided in the statute upon which to levy an assessment upon these two vendors, thereby placing upon such vendors the burden of disproving the facts constituting such "information." This was in recognition of that provision of the Sales Tax Act (Sec. 5546-2 G. C.) which declares a presumption arising out of such information, from which the Court of Appeals declared, that the burden was upon the vendors to prove the accurate amount of taxable sales and incidentally the actual amount of taxes collected from consumers, and which had not been paid or accounted for to the State of Ohio. The Supreme Court of Ohio has completely reversed that situation and

has placed upon the Tax Commission the impossible burden of proving specific sales where the vendors kept no record of such sales as they were required to do by the provisions of the Sales Tax Act. It therefore rendered the law nugatory and stripped the State and the Tax Commissioner of the only remedy existing and provided by statute to protect the State in the public revenue arising from the *levy and collection* of this tax.

It, therefore, under the 14th amendment does become the *controlling question.*

IV.

PUBLIC IMPORTANCE.

The question thus raised and the right thus denied, is a matter of grave and far-reaching public importance.

Taxation is an attribute of sovereignty. The power to levy and collect taxes under our constitutional system, state and federal, has been delegated to the government. The power has been reposed in the Legislature, and Ohio Legislature has discharged its full duty. It has remained for its work to be nullified by the Ohio Supreme Court.

Since "every act required of public authorities has been done in the levy of this tax," nothing remained but the payment of the money. The vendors have failed to pay over the tax money thus collected.

Chief Justice Marshall in *McCullough vs. Maryland*, 4 Wheaton pp. 316, 425, first declared this fundamental truth:

> "The power to tax is of vital importance * * *"

And this Court said in *Prov. Bank vs. Billings*, 4 Peters 514, "The power is essential to the existence of government."

The power and duty specifically enjoined upon the Tax Commissioner, under the Sales Tax law and as upheld by the Court of Appeals, is governed by the following well-

known cases. *C. W. and Z. R. R. vs. Clinton,* 1 O. S. 88-94, cited in *Panama Ref. Co. vs. Ryan,* 293 U. S. 388, 421, 426. *Hampton Jr. vs. U. S.,* 276 U. S. 404, 408, 409, 412.

At the risk of this petition being drawn out to unreasonable lengths, we feel that we should cite and briefly comment upon two or three additional cases.

In *Mutual Film Company vs. Industrial Commission of Ohio,* 236 U. S. 245, this Court declared the rule for which we contend in a case involving the delegation of power to the Ohio Industrial Commission.

Another pertinent authority is *Union Bridge Company vs. United States,* 204 U. S. 364 at page 387. Again this Court was considering the question of a valid exercise of the delegation of legislative power.

In both of these cases, this Court declared that the principles involved were of great public importance because of the threatened stripping of the state and its commissions of all real remedies. It was declared in those cases that to do what the Supreme Court of Ohio has done herein, is "to stop the wheels of government, and bring about confusion and paralysis in the conduct of public business."

That this matter is of great importance is further evidenced by the fact, that since the filing of the original petition in this Court, there were a large number of bills introduced in the Ohio General Assembly relating to this subject matter.

Most of these bills were introduced or caused to be introduced by large vendor tax collectors or their registered lobbyists. Such bills sought either a destruction of the records upon which such assessments could be based or audits made, or they provided a limitation of action for an assessment for personal liability for failure to make accounting for such taxes levied and collected.

One bill, S. B. 218, introduced by Senator Metzenbaum, openly recognizing that the law was complete and that the

tax commissioner was enabled to make the assessments as adjudged by the Court of Appeals herein, but taking note of the decision of the Supreme Court herein, that the state could do nothing if vendors failed to keep records required by law and the state could not prove each specific sale, sought to amend the law to more specifically require each vendor to keep a record of each specific sale and the tax collected.

The Senate Taxation Committee continued hearings on that bill, until after this Court denied this petition herein. The large vendors apparently fearful that some court action might result in amending the law, professed to be in favor of such law. After the denial of the petition herein—such proposed amendment was promptly voted upon in committee adversely.

The Head of Sales Tax Division testified and stated before the committee that the state was losing from 5 to 8 million dollars each year, since 1935, by the principle declared by the Supreme Court of Ohio, herein, to enforce such law. He even admitted to a member of the Senate that he was estopped from making audits to protect the state by someone in the front office.

Most of these matters appeared in the public press of the state.

It was further openly stated that if the situation was not corrected, arising out of the effect of the decision of the Supreme Court of Ohio herein, that it would result in an amendment by an overwhelming vote to prohibit all excise taxes, sales taxes as well as others.

It must be clear, therefore, that the result of the action of the Supreme Court of Ohio, in stripping the state of all remedy for an injury done it, does violate the 14th Amendment and is a question of far-reaching public importance.

V.

We are encouraged to file this petition for rehearing and to earnestly pray that this Court allow the petition for certiorari upon such rehearing because we find that on a former occasion, to-wit, October 8, 1928, this Court denied a petition for writ of certiorari in the case of *Carnuth, etc., vs. United States,* 278 U. S. 607 and on November 18, 1928, upon a petition for rehearing being considered the same was granted, and the former order revoked and a writ of certiorari granted, 278 U. S. 594. That case was later heard on its merits by this Court, 279 U. S. 231, and at page 235, this Court stated:

> "We granted the writ of certiorari because of the far-reaching importance of the question."

That case involved the immigration laws, but we insist that that case was not of greater importance than the instant case.

VI.

For the foregoing reasons, petitioner respectfully urges that a rehearing be granted; that upon further consideration, the order of April 23, 1945, denying the petition for certiorari, be revoked and that a writ of certiorari issue.

MATTHEW L. BIGGER,
Attorney for Petitioner.

I, Matthew L. Bigger, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

MATTHEW L. BIGGER,
Attorney for Petitioner.